

CHAPTER 4

MAKING THE RECORD IN THE COURTROOM: COURTROOM PROCEDURES

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Introduction

Making the record is one of the most challenging but important functions of a court reporter. An accurate record is essential for trials and appeals. Because of an ever increasing volume of cases, a court reporter must find an efficient and accurate method. The court reporter should review T. R. 74 and Crim. Rule 5 in Chapter 2.

In murder cases where the death sentence is sought, Crim. R. 24 mandates the use of stenographic recording with computer-assisted transcription. See Chapter 2.

Recording Methods

Traditionally, a court reporter transcribed the proceedings from notes taken in manual shorthand. See Chapter 1. Currently, T. R. 74 and Crim. R. 5 authorizes the judge to provide for the recording of the proceedings by electronic or mechanical devices, or by stenographic reporting with computer-aided transcription capability. The judge has discretion to eliminate shorthand or stenographic reporting of any recorded matter except death penalty cases.

Scope

The court reporter should review T. R. 51, T. R. 74, Crim. R. 5, and Crim. R. 8. See Chapter 2.

Modern technology continues to improve and expedite the recording process. Technological innovations will continue to permit a reduction in cost and time. A court reporter is encouraged to keep abreast of developing technology and be ever mindful of the rules, which are frequently amended. Rules exist to assure uniformity, reliability and accuracy.

Court Reporting Techniques

At present, most Indiana court reporters use one of the three basic techniques to record proceedings: shorthand (manual or stenotype), electronic tape recording and digital recording. To achieve maximum accuracy, many court reporters have elected to utilize more than one technique. Computer-aided transcription will continue to make great strides.

Shorthand Reporting

Shorthand is the oldest court reporting technique. A shorthand court reporter uses graphic symbols, which represent phonetic speech. The symbols are very concise to permit the speed necessary to make a verbatim record.

A court reporter that uses a stenotype machine makes the record by striking a combination of keys on a special keyboard. The keys, representing phonetic speech sounds, imprint a paper tape with an inked ribbon. According to National Shorthand Reporting Association standards, a competent court reporter using either method should be able to record a minimum of 200 words per minute, averaging 4 words per second.

Shorthand Reporter Notes

In addition to recording every word of testimony, a shorthand court reporter must identify speakers, classify kinds of testimony, and make notes regarding places where the correct spelling of proper names and medical, legal and technical terms may be needed. Notes should include identification of objections, motions, rulings, instructions, stipulations and the admission and exclusion of exhibits.

Audio Electronic Tape Recording

Audio electronic tape recording has been the dominant reporting method, particularly in the smaller counties. The dominance of electronic tape recording has arisen for several reasons, including: unavailability of court reporters that have shorthand training, immediate playback capability, low cost, high accuracy and ability to use another person to prepare a transcript.

A complete and accurate record on electronic recording tape depends upon two criteria: (1) quality equipment, and (2) a trained, conscientious court reporter. A trained and conscientious court reporter must monitor the recording tape continuously and maintain a complete and legible log accompanied by an index. The judge must provide a storage facility. Even if a perfect electronic tape recording has been taken, a transcript will only be as good as the court reporter's listening and typing/transcription abilities.

Digital Electronic Recording

Digital recording systems are replacing audio tape recording systems. It is not a matter of the audio systems not working well enough, but the digital system is more efficient in recording, archiving, distributing, reviewing and storing. Digital systems can record up to 22 hours on a single CD where tape recorders usually record only three hours on a single cassette tape and decrease the amount of storage space needed. Log note software is also available with the digital recording systems. As with the audio systems, it is imperative with the digital systems to have quality equipment and trained, conscientious court reporters.

Reporter Notes

In the era of recording through electronic means, reporter notes have expanded to include both a log and an index. Reporter notes should not be confused with the making of Chronological Case Summary entries as they are created to assist the reporter in preparation of a requested transcript or to locate within the record where an event occurred that needs to be reviewed.

Log

A log of a trial is essential for preparation of a complete and accurate transcript. A log is the equivalent of a table of contents. A properly constructed log of a trial should: (1) identify speakers, (2) classify kinds of testimony, (3) note places where correct spelling of proper names and medical or technical terms may be needed, and (4) locate where objections, motions, stipulations, rulings, instructions and the admission and exclusion of exhibits may be found. See Chapter 2.

Index

An index of a trial contains a caption and a list of counsel as well as a list of tape or digital reference points corresponding to the recording device's counter or display. The index should be kept with the electronic audiotape or the CD.

The tape counter or digital display provides a quick and reliable way to identify and locate particular statements or portions of testimony. The number on the counter or display should be noted frequently. This enables the court reporter to respond quickly to a "repeat the question" request from a witness, or a "play back that question and answer" request made by either the judge, counsel, or a juror during the trial.

Care of Electronic Tape Recording and Digital Recording Equipment

A court reporter is responsible for the maintenance of the electronic tape recording and digital recording equipment. See Crim. R. 5: "The recording device or the computer-aided transcription equipment shall be selected and approved by the court and may be placed under the supervision and operation of the official court reporter . . .".

The court reporter must be very familiar with the operation of the equipment and must make certain it is functioning properly before the making of a record of any proceeding commences. The court reporter and the judge must have a plan to immediately access replacement equipment. See Chapter 3.

If a mechanical malfunction of the electronic tape or digital recording equipment occurs during the proceedings, the court reporter must immediately inform the judge of the problem.

Audio Electronic Tape and CD Storage

The Information Management Section, Division of State Court Administration recommends that the mixing of different case types on a single audio recording tape/CD should be avoided. Each case type has a different retention schedule, and the mixing of short-term retention cases with long-term retention cases adds to the number of cassettes for which storage is required and adds additional maintenance and storage effort and expense.

Certain tapes contain confidential information that must be made secure. Recording on segregated tapes/CDs is the most effective and efficient means for the proper storage of these records.

If electronic tapes/CDs used to make a record of a proceeding are not properly identified and stored, a court reporter may face sanctions. See Admin. Rule 10 and Chapter 2. Each electronic tape/CD should be identified by case number, caption, and describe the general nature of the procedure recorded, including the day, date, and time. Electronic tapes should not be stored for long time periods under conditions of extreme humidity, temperature or strong magnetic fields. Tapes/CDs will endure for many years if properly stored and handled.

Retention of Outdated Equipment

In the event a new method of recording equipment is implemented, it is essential to retain equipment needed for future transcription of proceedings previously recorded.

Common Reporting Problems

Audibility

Control of the proceedings in the court is the responsibility of the judge. The court reporter notifies the judge of the existence of a problem; the judge decides upon the appropriate remedy and notifies the parties and counsel. See Chapter 1.

In order for an accurate record to be made, each party, each witness, and each attorney must speak loudly and clearly. It is the responsibility of the judge to ensure that loud and clear voices are used. The court reporter must not hesitate to seek immediate consultation with the judge if the court reporter cannot hear or understand the speaker. An electronic tape recorder cannot pick up very low voices.

The court reporter must seek immediate consultation with the judge regarding other conditions, which may hinder production of a satisfactory record. Audibility problems can be caused by traffic noise, a passing train, jewelry rattling near a microphone, unruly spectators, electronic devices, etc.

Simultaneous Speech

Simultaneous speaking or "overlapping" presents a major verbatim problem for a court reporter. In a heated cross-examination, an attorney may question a witness, the witness may anticipate the question and begin to respond, and opposing counsel's voiced objection may occur almost simultaneously. This rapid speech pattern cannot be recorded properly, and the audio electronic tape recording of the occurrence would be indiscernible.

Use of multi-track equipment may help to alleviate this problem, but only if each person involved remains physically located in the pre-assigned place and each person involved is speaking into the proper pre-assigned microphone. The court reporter must seek immediate consultation with the judge in the event that simultaneous speech occurs. The court reporter may suggest that the question, answer and objection be re-stated for the record.

Gestures

From time to time, both counsel and the witnesses may use gestures to clarify specific points instead of words. A witness may point "over there" or at "that person sitting there." A witness might state, "the car turned this way". It is the responsibility of the judge and counsel to clarify these points. A court reporter is not expected to make a record of a gesture.

The proper courtroom practice requires that, immediately after a gesture, counsel should state, "Let the record show . . ." followed by a verbal description of the gesture. If this procedure is used, the court reporter makes a record.

If proper practice is not followed, the court reporter should note a very general description of the gesture in the log for later insertion into the transcript as a parenthetical note. See Chapter 5.

Demonstrative Evidence Not Admitted During the Trial - Example: The Black Board Drawing

If a witness draws a diagram on a blackboard to illustrate testimony, the drawing does not become an exhibit unless it is offered by a party and ordered admitted by the judge. If the drawing is offered and admitted, the court reporter should be prepared to take a photograph. If the drawing is not offered and admitted, counsel may stipulate that the drawing may be used during presentation of the evidence and during final arguments. The court reporter makes a record of such a stipulation.

"Off the Record"

Practices vary widely regarding the proper procedure to address this problem. The court reporter and the judge should reach an agreement regarding whether a record should be made in advance of each proceeding.

Recording conversation between attorneys at the counsel table or between counsel and the judge at the bench (a side bar conference) presents a problem for the court reporter.

Generally, the court reporter should not make a record of any conversations between counsels that occur at counsel table. If the court reporter has a question regarding whether a record should be made, the court reporter must seek an immediate consultation with the judge.

If an agreement has not been reached before the proceeding, the court reporter should seek an immediate consultation with the judge either in the event that the judge calls to counsel to "approach the bench" or in the event that an attorney states that "leave to approach the bench" is sought.

At a sidebar conference, the judge should inform the court reporter when to go "off the record", and the judge should indicate when to resume making the record. Some court reporters indicate that the best practice is that all sidebar conversations in court during the course of a trial are "on the record". If there is uncertainty, the court reporter should not hesitate to seek an immediate consultation with the judge.

Testimony Stricken from the Record - "Strike That"

This problem usually arises out of a unilateral statement by counsel who begins a question directed to a witness. Counsel does not complete the question, but counsel directs the court reporter to "strike that" and begins to state a new question.

The court reporter makes a record of **all** questions, **all** answers, and **all** objections whether or not ordered to strike the subject matter from the record.

Rephrased Question

An attorney may express a desire to rephrase, withdraw, or strike a question. The court reporter makes a record of each such expression and preserves each question, even if rephrased, as a part of the record.

During examination, a witness may express a lack of understanding of a question. The court reporter makes a record of each such expression. In response to the witness's expression, proper courtroom practice would require counsel to withdraw the previous question and proceed to ask a new question. The court reporter makes a record of the first question, counsel's expression, the new question and the witness's answer.

Motion to Strike

A motion to strike may address: (1) the situation where a witness has not properly responded to a question by making a volunteered statement during examination; (2) the situation where evidence was admitted "subject to connection" and counsel failed to make a proper foundation for admission; and (3) to correct an error regarding the admission of evidence.

The court reporter must not take these words literally. Usually, the process is initiated by an objection raised by counsel followed by a ruling from the bench by the judge. In the event that a motion to strike testimony is granted, the testimony ordered stricken remains part of the court reporter's record. The judge may issue a verbal instruction to the jury to "disregard" certain "testimony". The court reporter makes a record of each such occurrence. A log and index entry should be made of each such event.

Special Situations

The witness who does not speak English or who is deaf - Interpreters

I.C. 34-45-1-3 T. R. 43 (C), and Crim. R. 21 govern the use of interpreters at trial. Generally, counsel for the respective parties has raised the need for use of an interpreter before the trial at a pre-trial conference. The judge may delegate the task of obtaining an interpreter to the court reporter. The court reporter should follow the directives of the judge.

A special oath is utilized to swear in an interpreter. The oath appears below (see I.C. 34-45-1-5):

Do you solemnly swear (or affirm) that you will justly, truly and impartially interpret to . . . (insert witness name) . . . the oath about to be administered to him (her), and the questions which may be asked him (her), and the answers that he (she) shall give to such questions, relative to the cause now under consideration before this court so help you God (or under the pains and penalties of perjury)?

In the case of a deaf witness, it may be necessary to obtain a person who has the ability to sign and to translate sign language. T. R. 43(C) expressly incorporates the Americans with Disabilities Act, "42 U.S.C. 12101, 29 C.F.R. 1630 et seq. A reasonable accommodation may include use of special voice recognition software.

Contempt

An outburst or other behavior disrupting court proceedings may precipitate the initiation of a direct contempt hearing. The court reporter should attempt to make a record of any disruption. The court reporter may be required to be a witness in such a contempt hearing and should be alert and familiar with the proceedings. See Chapter 2.

If the judge issues an admonishment to the audience, the court reporter must make a record of the admonishment.

Clearing the Courtroom

Occasionally, the judge may order that the courtroom be cleared, and subsequent proceedings in the case be closed to the media and to the public. Usually, this situation may arise in a case where there may be some danger to a witness, and the situation will end after that witness has testified. In the event that a hearing is required before the courtroom is closed, the court reporter must make a record of any such hearing. The judge may announce findings of fact and conclusions of law from the bench. The court reporter must make a record of any such announcement by the judge. See I.C. 5-14-2-1 et seq. and Kendrick v. State, 661 N.E.2d 1242 (Ind. Ct. App. 1996). See Chapter 2.

Exhibits

Marking Exhibits Before Offer and Ruling on Admissibility

Marking exhibits is the duty of the court reporter. Exhibits are marked in order to achieve clarity of identity and reference during the making of the record and the transcript. Clarity of identity refers to proper attribution of the exhibit to the party who offered the exhibit during a trial. Clarity of reference refers to the elimination of any confusion by achieving a common language reference to the exhibit which is thereafter used by all speakers.

Exhibits should be marked as follows: (1) exhibits for the plaintiff are marked as "Plaintiff's Exhibit" followed by consecutive whole numbers, and (2) exhibits for the defendant are marked as "Defendant's Exhibit" followed by consecutive letters. When the entire alphabet has been used, the letters are doubled for the next series of defense exhibits ("AA; AB; AC,").

A stipulated exhibit is referenced as "Stipulated Exhibit" and either numbers or letters may be used. See Chapter 2.

In the event the exhibits are not marked before commencement of the proceeding, (See Chapter 3), counsel delivers the exhibit to the court reporter during the testimony of a witness. The court reporter marks the exhibit for identification and makes separate appropriate log and index entries. After the exhibit is marked, questions and answers may contain references to the marked exhibit. Counsel may or may not offer a marked exhibit into evidence. Separate log and index entries must be made when each exhibit is

offered into evidence. After the exhibit is offered into evidence, any adverse party has the opportunity to state an objection to the admission of the exhibit. Separate log and index references must be made for each objection made by each objecting party. One party may join the objection of another party and state additional objections. The judge will announce a ruling regarding whether the exhibit is admitted or denied. Separate log and index entries must be made when the judge announces the ruling. Regardless of whether an exhibit is admitted or denied, possession of the exhibit is retained by the court reporter after the exhibit is offered.

An exhibit offered at trial may have been previously marked in a deposition. Generally deposition exhibits are marked in the same manner as trial exhibits. Usually, deposition exhibits are marked with the additional words "for identification". At trial, the marking given the exhibit at the deposition is usually ignored, absent a stipulation by the parties.

After an exhibit has been admitted, counsel may seek permission to withdraw the exhibit and substitute a copy. If the judge permits withdrawal and substitution, the court reporter should make separate log and index entries. The court reporter keeps custody of the copy instead of the original after a substitution has been permitted.

An "information" sheet should be maintained to keep track of the exhibits marked, offered, admitted, denied, withdrawn, or never offered. Examples are included in Appendix E.

After the offer, exhibits become the property of the court reporter. The court reporter should take special care to account for each exhibit at each recess. The court reporter does not take possession of exhibits that were not offered; these are returned to counsel.

Exhibits shall be retained by the court reporter under lock and key, according to time limits established by statutes and by the rules. See Chapters 2 and 6. The court reporter should not allow any person, except the judge, access to the storage room. The court reporter shall be present during any entry into the exhibit storage area that is made by either the judge or another member of the staff.

In civil cases where a timely praecipe has not been filed, exhibits may be released to counsel. As a precautionary measure, the court reporter should require a written receipt signed by the attorney before releasing the exhibits. See Chapter 6.

Exhibits to the Jury Room

The judge is permitted to allow the jury to take admitted exhibits to the jury room. If the judge designates the court reporter to carry out this function, the reporter has a special duty to ensure that only admitted exhibits are sent to the jury room. An error might serve as the underlying basis for a mistrial motion.

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